Office - Supreme Court, U.S.
FILED
NOV 12 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2219

In the Supreme Court of the United States

OCTOBER TERM, 1982

TRAN QUI THAN, PETITIONER

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

LEONARD SCHAITMAN
AL J. DANIEL, JR.
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the Secretary of the Treasury abused his discretion in determining that assets in the United States of a bank incorporated under the laws of the Republic of Vietnam by Vietnamese nationals and doing business in that country were properly blocked under the Foreign Assets Control Regulations promulgated pursuant to Section 5(b) of the Trading With the Enemy Act, 50 U.S.C. (& Supp. IV) App. 5(b), and in declining to issue a license authorizing the transfer of such assets.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	23

TABLE OF AUTHORITIES

Cases:

Agajan v. *Clark*, 381 F.2d 937	18
Beck v. *McGrath*, 182 F.2d 315	15
Berenyi v. *Immigration Director*, 385 U.S. 630	14
Camp v. *Pitts*, 411 U.S. 138	2
Cheng Yih-Chun v. *Federal Reserve Board of New York*, 442 F.2d 460	22
Dames & Moore v. *Regan*, 453 U.S. 654	10, 11, 12, 21, 22
Haig v. *Agee*, 453 U.S. 280	11
Herrmann v. *Rogers*, 256 F.2d 871, remanded, 358 U.S. 332, prior opinion reaffirmed, 274 F.2d 842, cert. denied, 364 U.S. 821	15
Kaufman v. *Societe Internationale*, 343 U.S. 156	20
Koehler v. *Clark*, 170 F.2d 779	15
Maltina Corp. v. *Cawy Bottling Corp.*, 462 F.2d 1021, cert. denied, 409 U.S. 1060	21
N. V. Handelsbureau La Mola v. *Kennedy*, 299 F.2d 923, cert. denied, 370 U.S. 940	13
Nielsen v. *Secretary of Treasury*, 424 F.2d 833	13, 16, 18, 19, 20, 22
Real v. *Simon*, 510 F.2d 557	16, 17
Russian Volunteer Fleet v. *United States*, 282 U.S. 481	22
Schmieder v. *Hall*, 545 F.2d 768, aff'g 421 F. Supp. 1208	14-15
Silesian-American Corp. v. *Clark*, 332 U.S. 469	22
Standard Oil Co. v. *Clark*, 163 F.2d 917, cert. denied, 333 U.S. 873	15

Cases—Continued Page

Stoehr v. *Wallace*, 255 U.S. 239 15
Swiss National Insurance Co. v. *Miller*, 267 U.S. 42 13
United States v. *Caltex, Inc.*, 344 U.S. 149 22
United States v. *Pink*, 315 U.S. 203 8
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 11

Constitution, treaty, statutes and regulations:

United States Constitution:
Fifth Amendment 7
Fourteenth Amendment 7
Treaty of Amity and Economic Relations of 1961, United States of America—Republic of Vietnam, 12 U.S.T. 1703, T.I.A.S. No. 4890 7
Administrative Procedure Act, 5 U.S.C. 706(2)(A)-(C) 8
International Emergency Economic Powers Act, 50 U.S.C. (Supp. IV) 1702 10
Trading With the Enemy Act, 50 U.S.C. (& Supp. IV) App. 5(b) 2, 4, 10
22 U.S.C. (Supp. IV) 1645 *et seq.* 12
31 C.F.R.:
Sections 500.101 *et seq.* 2
Section 500.201 18
Section 500.201(a) 5, 13, 16
Section 500.201(b) 5, 13
Section 500.201(b)(2)(d) 5
Section 500.203(b) 15
Section 500.302(a)(2) 5, 13, 18
Section 500.305 13
Section 500.558 18
Section 500.559 18
Section 500.801(b)(3) 7
Section 500.802 7

Miscellaneous:

126 Cong. Rec. S16572 (daily ed. Dec. 15, 1980) 12
H.R. Rep. No. 95-459, 95th Cong., 1st Sess. (1977) 11

Miscellaneous—Continued	Page
H.R. Rep. No. 96-915, 96th Cong., 2d Sess. (1980)	12
Restatement (Second) Foreign Relations Law of the United States (1965)	18
S. Rep. No. 95-466, 95th Cong., 1st Sess. (1977)	11

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2219

TRAN QUI THAN, PETITIONER

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A39) is reported at 658 F.2d 1296. The opinion of the district court (Pet. App. C1-C34) is reported at 469 F. Supp. 1202.

JURISDICTION

The judgment of the court of appeals was entered on October 13, 1981, and a petition for rehearing was denied on March 1, 1982 (Pet. App. B1). The petition for a writ of certiorari was filed on June 1, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Tran Qui Than filed this action against the Secretary of the Treasury seeking a declaratory judgment that he is entitled to a license unblocking certain frozen assets in the United States allegedly belonging to the Dong Phuong Bank, a Vietnamese bank in which he was a shareholder and officer. The Secretary had denied his application for such a license pursuant to the Trading With the Enemy Act, 50 U.S.C. (& Supp. IV) App. 5(b), and the Foreign Assets Control Regulations, 31 C.F.R. 500.101 *et seq.* (Pet. App. A2). The district court upheld the Secretary's decision (Pet. App. C1-C34), and the court of appeals affirmed (Pet. App. A1-A39).[1]

1. Petitioner is a citizen and national of the Republic of Vietnam (South Vietnam), although he now resides in the United States (Pet. App. A2-A3).[2] Prior to April 25, 1975, petitioner resided in Saigon, where he was a shareholder and officer of the Dong Phuong

---

[1] The court of appeals remanded for further proceedings in connection with the Secretary's demand that certain funds paid to petitioner from a Navy contract payment be placed in a blocked account (Pet. App. A37-A38). No question concerning that remand is presented here.

[2] In the court of appeals (Pet. App. A2), petitioner did not dispute the facts as stated by the district court (Pet. App. C2-C8). Than Br. 6. Some of the facts as stated by the courts below were based on the record developed in the district court, which included answers to interrogatories, depositions, and affidavits. However, the court of appeals held that its review of the Secretary's decision was limited to the administrative record that was before him at the time of his decision, "not considering some new record that was made in the district court subsequent to the Secretary's decision" (Pet. App. A22 n.12, citing *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973)). In any event, the additional facts in the district court record would not alter the result in this case.

Bank (*ibid.*). He left Vietnam on April 25, 1975, just before the take-over of the country by Communist forces, and arrived in the United States shortly thereafter (Pet. App. A2, C3).

The Dong Phuong Bank was incorporated in 1968 under the laws of the Republic of Vietnam (Pet. App. A3).[3] Some ten directors held more than 80% of all shares of the bank. Petitioner was the largest single shareholder, with just under 13% of the outstanding shares (*ibid.*).[4] On April 15, 1975, the directors and shareholders of the Bank met "to consider the consequences to the Bank which might follow the defeat of the South Vietnamese forces" (*ibid.*). Those present adopted a resolution providing in part:

> 2. Accordingly, the Management Board decides that those among the Management Board members who will be able to leave the country will be qualified to manage and to make use of all the accounts of the Dong Phoung Bank in banks located out of Vietnam as well as the properties that the Dong Phoung Bank possesses abroad.
>
> 3. At the same time, the Management Board empowers those among the Management Board members who will remain in Vietnam to manage and to make use of the properties of the Dong Phuong Bank located in the country.

---

[3] According to petitioner, the bank was the largest private commercial bank in South Vietnam, with 22 branches, second in size only to the government bank (Than Dep. 26; C.A. App. 148) ("Than Dep." refers to the deposition of Tran Qui Than dated Sept. 27, 1977; "C.A. App." refers to the appendix filed in the court of appeals).

[4] At the time of the proceedings in the district court, two shareholders, including petitioner, resided in the United States, as did the heirs of a third, who died here. Four shareholders still resided in Vietnam. The remaining shareholders were either in France or Hong Kong. C.A. App. 147.

> The present decision will be enforced beginning the day when the Saigon metropolis will be occupied by the Communist government.

(Pet. App. A5 n.2).

On April 30, 1975, South Vietnam fell to Communist forces (Pet. App. A3), who issued a communique on May 1, 1975 stating "that banks would be confiscated and * * * 'managed by the revolutionary administration' " (*id.* at A5).[5] The Foreign Assets Control Regulations, issued under Section 5(b) of the Trading With the Enemy Act, 50 U.S.C. App. 5(b), were made applicable to South Vietnam on "April 30,

---

[5] Subsequent broadcasts and news articles indicated that private banks nevertheless continued to operate after May 1, 1975. A broadcast on August 30, 1975, announced a decision of the Council of Ministers of the Provisional Revolutionary Government that "[o]perations of private banks and credit firms * * * are hereby discontinued" and specified procedures for "liquidation under the guidance of the National Bank of Vietnam * * *," including payment of customers' accounts and deposits and collections of debts (C.A. App. 198). The private banks were then to "settle the problem of property with the National Bank and shareholders" (C.A. App. 200). This announcement also was reported in the Bangkok *Post*, which stated that the decree specifically referred to the Dong Phuong Bank (C.A. App. 333). Mr. Le Van Lo, one of the Bank's directors, confirmed this announcement, on information and belief (C.A. App. 160). It also was supported by an article in the Far Eastern Economic Review on October 3, 1975, which was attached to Mr. Lo's affidavit (C.A. App. 176). Whatever the meaning or significance of the Vietnamese term translated as "confiscation" in the May 1 communique may be, these subsequent broadcasts and announcements provide some indication that private banks, including the Dong Phuong Bank, were open as late as August 1975, to pay out deposits and collect loans and that some kind of settlement was to occur with their shareholders. None of this information was in the record before the Secretary, but it does provide further support for his decision.

1975 at 12:00 p.m. e.d.t." 31 C.F.R. 500.201(b)(2)(d) (Pet. App. A6-A9 & n.5). The Regulations prohibit all transactions involving transfers or payments of virtually any kind of property, including credits, currency or otherwise, if they "involve property in which any designated foreign country, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect * * *." 31 C.F.R. 500.201(a) and (b). "National" includes a corporation organized under the laws of a designated country. Section 500.302(a)(2).

At the time the revolutionary government issued its confiscation communique, the Dong Phuong Bank "was the assignee of monies owed to certain local Vietnamese contractors under several contracts with the United States Army and Navy" (Pet. App. A5-A6).* The contractors had performed the work on the contracts, but full payment had not been made by the United States at the time South Vietnam fell (*id.* at A6 n.4). The balance due on the Army contract involved in this case is $221,235.00 (*id.* at A6).

2. After his arrival in the United States, petitioner, acting on behalf of the Bank, sought payment

---

* According to petitioner, as of May 1, 1975, the Dong Phuong Bank had over half a million dollars in assets in bank accounts and contracts outside of Vietnam, to which the shareholders' resolution arguably applied (C.A. App. 143-145). It also had 164.24 pounds sterling in an account in London. (C.A. App. 145). The dollar assets consist of a total of $208,661.54 on deposit in banks in the United States and $87,031.70 in a bank in Paris (C.A. App. 144-145). The bank accounts in the United States are also frozen and are the subject of other suits, which have been stayed pending the outcome in this case. *Tran Qui Than* v. *City Bank International*, No. C-79-0166 WWS (N.D. Cal., filed Jan. 26, 1979); *Tran Qui Than* v. *First National City Bank*, No. 77 Civ. 6316 (S.D.N.Y., filed Dec. 30, 1977).

of the amount due from the Army (Pet. App. A6). The Army refused to pay without an unblocking license from the Secretary of the Treasury (*id.* at A8-A10).[7] Petitioner filed an application for a license with the Secretary's Office of Foreign Assets Control on December 22, 1976 (*id.* at A10).

On February 22, 1977, the Secretary, through the Office of Foreign Assets Control, denied the application, stating (Pet. App. D3):

> The Dong Phuong Bank, a Vietnamese Corporation, is a designated national under the Regulations. The Regulations prohibit, in the absence of a Treasury license, all transactions involving assets in the United States in which a Vietnamese national has, or has had on or since April 30, 1975, any interest whatsoever. On April 30, 1975, the Bank had an interest in the funds due under all contracts which had been assigned to it. This interest could not be transferred after April 30, 1975, without a license from this Office.

The Secretary specifically rejected petitioner's claim that the resolution of the directors on April 15, 1975 was effective to dissolve the Bank prior to the blocking of the Bank's American-based assets (*id.* at D3-D4):

> The actions of the shareholders and directors of the Bank described in the Applications were ineffective to dissolve it or transfer its assets.

---

[7] A balance of $49,965.06 due on a Navy contract was inadvertently paid to a Vietnamese contractor without an unblocking license after petitioner signed a release of the Bank's claim as assignee of those payments. Of that sum, petitioner was paid $29,975.44 as the Bank's share. He retained $5,798.00 and distributed the remainder among other shareholders of the Bank (Pet. App. A 0). That payment is not involved in this petition. See note 1, *supra*.

> The Resolution did not even purport to transfer the bank's interest in the United States assets to these shareholders. Further, no evidence has been submitted in support of the assertion that the Resolution effected a valid dissolution of the corporation under the laws of South Viet-Nam. Accordingly, there was neither a dissolution nor a transfer made prior to April 30, 1975, of the Bank's interest in the funds to the shareholders who left Viet-Nam.

Petitioner did not request an opportunity "to present additional information or discuss or argue the application [either] before or after the decision," as permitted by the Regulations. 31 C.F.R. 500.801(b)(3). Nor did he request a hearing. Section 500.802. See Pet. App. C11.

3. On June 23, 1977, petitioner filed this action against the Secretary in the United States District Court for the Northern District of California (Pet. App. A12, C8). Petitioner contended (1) that the Secretary erred in concluding that the Bank was a "designated national" and that he was not entitled to an "unblocking" license under the Regulations; (2) that the refusal to issue a license was a taking of property without just compensation, in violation of the Fifth Amendment, and a discrimination against aliens, in violation of the Fourteenth Amendment; and (3) that the Secretary's action violated petitioner's rights under the Treaty of Amity and Economic Relations of 1961, United States of America—Republic of Vietnam, 12 U.S.T. 1703, T.I.A.S. No. 4890 (Pet. App. A12-A13).

The district court held that the Secretary's decision was subject only to limited judicial review

under the Administrative Procedure Act, 5 U.S.C. 706(2)(A)-(C) (Pet. App. C10-C12). It agreed that the Bank was a "designated national" and that "[o]n their face, the Regulations apply to the Dong Phuong Bank as the Secretary has determined" (*id.* at C14). The court noted that petitioner did "not dispute that the Regulations, so interpreted, apply to block the transaction at issue" (*ibid.*). The district court also ruled that the Secretary's determination that the Bank had not been dissolved prior to blocking was not "arbitrary, capricious, an abuse of discretion, or contrary to law" (*id.* at C16). Accordingly, it upheld the Secretary's refusal to issue an "unblocking" license to petitioner (*id.* at C22-C27). It also held that no "taking" had occurred within the meaning of the Fifth Amendment (*id.* at C27-C30), and that, in any event, petitioner and the other shareholders had not shown that they had a "protected property interest in the claims owned by the Bank" (*id.* at C28). The court further concluded that there was no denial of equal protection resulting from any distinction "between claims by United States citizens and claims of nationals of the country whose government has confiscated their property" (*id.* at C30-C32, citing *United States* v. *Pink*, 315 U.S. 203 (1942)). Finally, the court held that the Treaty invoked by petitioner terminated upon the fall of the Republic of Vietnam and thus gave no support to his claim (Pet. App. C32-C33).

4. The court of appeals affirmed (Pet. App. A1-A36). The court upheld the Secretary's decision that the Dong Phuong Bank is a "designated national" under the Regulations and that the April 15 resolu-

tion had not dissolved the corporation and transferred its American-based assets to the shareholders (*id.* at A20-A23). The court observed that the resolution did not by its express terms accomplish such a dissolution and transfer and that, in any event, "[n]o mention is made of any authorization for those shareholders to own those assets outright" (*id.* at A22-A23). The court rejected petitioner's claim that the Bank had been "seized and destroyed upon the fall of Saigon," before the effective date of the Regulations, because that issue had not been presented to the Secretary and could not be raised for the first time in the district court or on appeal (*id.* at A23-A24).

Petitioner's other claims were found lacking for largely the same reasons articulated by the district court (Pet. App. A24-A36). Thus, the court of appeals held that the Secretary's decision did not give extraterritorial effect to any purported expropriation of the Bank's assets in the United States (*id.* at 28). In the court's view, the decision, as required by the Regulations, merely blocks those assets temporarily, "until a resolution of American claims is made or some other political agreement is reached with [Vietnam]" (*ibid.*).

The court of appeals also rejected petitioner's "taking" argument, noting that "[t]he Trading with the Enemy Act and the Regulations * * * received the constitutional imprimatur of the Supreme Court in *Propper* v. *Clark*, 337 U.S. 472 (1949)" (Pet. App. A28-A29). In addition, the court found no basis for petitioner's equal protection argument. It held that the Regulations' distinction between property belonging to individuals or partnerships and that of corporations was "rationally related to a legitimate governmental interest" and did not involve a suspect class

(*id.* at A32-A36). The court found it reasonable to assume that the successor government in Vietnam might assert an interest in the assets of corporations organized under the laws of the Republic of Vietnam (*id.* at A35). The court noted as well that the successor government might "assert an interest in the Bank's assets held in this country [and] that the United States could use the blocked funds as a diplomatic negotiating tool" (*id.* at A36), observing that the United States had recently done so in connection with recognition of the People's Republic of China and in resolving the hostage crisis in Iran (*id.* at A36 n.18).

ARGUMENT

The court of appeals correctly sustained the Secretary's determination that a national of Vietnam had an interest in the funds in issue when they were blocked and that those funds should remain temporarily blocked under the Foreign Assets Control Regulations. The decision below is fully consistent with this Court's decision in *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981), and does not conflict with any decision of another court of appeals. This largely fact-bound case does not merit further review.

1. In *Dames & Moore* v. *Regan*, *supra*, this Court reaffirmed the broad powers of the President with respect to the freezing of assets of the nationals of a hostile foreign country. *Dames & Moore* sustained the President's exercise of his powers under a section of the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. (Supp. IV) 1702, that was "directly drawn" from Section 5(b) of the Trading With the Enemy Act (TWEA), 50 U.S.C. (& Supp. IV) App. 5(b), the specific statutory provision involved in this case. 453 U.S. at 671. The Court held

that "both the legislative history and cases interpreting the TWEA fully sustain the broad authority of the Executive when acting under this congressional grant of power" (*id.* at 672). The Court explained (*id.* at 673):

> This Court has previously recognized that the congressional purpose in authorizing blocking orders is "to put control of foreign assets in the hands of the President . . . ." *Propper* v. *Clark*, 337 U.S. 472, 493 (1949). Such orders permit the President to maintain the foreign assets at his disposal for use in negotiating the resolution of a declared national emergency. The frozen assets serve as a "bargaining chip" to be used by the President when dealing with a hostile country.

Here, as in *Dames & Moore*, the President's action in blocking Vietnamese assets in this country, "taken pursuant to specific congressional authorization * * *, is 'supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.'" 453 U.S. at 674, quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). Petitioner has wholly failed to satisfy this burden.

The Committee Reports on IEEPA, enacted in 1977, discuss the asset control regulations under the TWEA that were then in effect for Vietnam and certain other countries (see H.R. Rep. No. 95-459, 95th Cong., 1st Sess. 6 & nn.17-21 (1977); S. Rep. No. 95-466, 95th Cong., 1st Sess. 3 (1977), and the enactment of the comparable authority in IEEPA therefore must be seen as a ratification of the general approach under those regulations. See *Haig* v. *Agee*, 453 U.S. 280, 301 (1981). Moreover, the Court spe-

cifically observed in *Dames & Moore* that Congress had amended the International Claims Settlement Act to provide for submission of claims of United States nationals against Vietnam to the Foreign Claims Settlement Commission, in order to establish an inventory of losses so that recovery could be achieved " 'through future direct Government-to-Government negotiation of private property claims' " (453 U.S. at 681, quoting H.R. Rep. No. 96-915, 96th Cong., 2d Sess. 2-3 (1980). See 22 U.S.C. (Supp. IV) 1645 *et seq.* The House Report on the amendment acknowledged that "[t]he United States controls some $140 million in assets of the Government, firms, and nationals of Vietnam," and expressed the "intent and expectation * * * that Vietnamese assets will remain frozen pending settlement of U.S. claims against Vietnam." H.R. Rep. No. 96-915, *supra*, at 3; accord, 126 Cong. Rec. S16572 (daily ed. Dec. 15, 1980) (remarks of Senator Zorinsky). Thus, Congress has authorized the blocking regulations in the Trading With The Enemy Act and ratified their application to the assets of Vietnamese nationals.

Petitioner has not advanced any reason for the Court to examine once again the well settled principles reviewed in *Dames & Moore* as applied to corporately owned Vietnamese assets in this country. Indeed, petitioner does not truly challenge the validity of the regulations as applied to Vietnamese property. Rather, petitioner's entire argument depends on his assertion that the assets involved in this case should be considered to be his *personal* property and that because he now resides in the United States, the property does not belong to a Vietnamese national. The Secretary of the Treasury, the district court, and the court of appeals all rejected that fact-bound contention, concluding that the assets are properly blocked

under the Regulations. This narrow question does not warrant review.

2. It was undisputed on the administrative record before the Secretary that the Dong Phuong Bank was a private commercial bank organized under the laws of South Vietnam and that the claim to the proceeds of the Army contract involved here was in the name of this Vietnamese Bank (C.A. App. 396, 398, 400, 413-415). Based on these undisputed facts alone, the Secretary correctly determined that the Bank is a "designated national" within the meaning of the Regulations (31 C.F.R. 500.302(a)(2) and 500.305) and that transfers of its assets in the United States are prohibited (31 C.F.R. 500.201(a) and (b)). See *Nielsen* v. *Secretary of Treasury*, 424 F.2d 833, 837-838 (D.C. Cir. 1970). See also *N. V. Handelsbureau La Mola* v. *Kennedy*, 299 F.2d 923 (D.C. Cir.), cert. denied, 370 U.S. 940 (1962) (assets of Dutch bank in United States properly vested in Alien Property Custodian because bank was incorporated within territory occupied by Germany). This conclusion is not altered by petitioner's contention that the bank has ceased doing business in Vietnam. *Swiss National Insurance Co.* v. *Miller*, 267 U.S. 42, 44 (1925). Both courts below held that the Secretary's determination that the assets are properly blocked was correct; indeed, the district court noted that petitioner "does not dispute that the Regulations, so interpreted, apply to block the transaction at issue here" (Pet. App. C14).

Instead, petitioner argued below and suggests here (Pet. 37-38) that the shareholders should be held to have effected a contingent "dissolution" of the Bank in their meeting of April 15, 1975. The Secretary correctly rejected this claim (Pet. App. D3-D4), and

the court of appeals and the district court upheld his determination. There is no occasion for this Court to review these factual findings of the two courts below. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967). In any event, petitioner's suggestion that it was arbitrary and capricious for the Secretary not to give effect to this purported "dissolution" is wholly without merit.

The only basis for petitioner's claim that the Bank was dissolved as a corporate entity or that its assets outside Vietnam were transferred to him and other shareholders is the resolution of April 15, 1975. That resolution states in pertinent part (Pet. App. A5 n.2):

> [T]hose * * * Board members who will be able to leave the country will be qualified to manage and to make use of all the accounts of the Dong Phuong Bank in banks located out of Vietnam as well as the properties that the Dong Phuong Bank possesses abroad.

Petitioner's application for a license did not in so many words assert that the Bank was dissolved or even refer to the resolution (C.A. App. 396-399); indeed, petitioner stated that he "desire[d] a license in order to execute a release, *in behalf of the Dong Phuong Bank*" (C.A. App. 398; emphasis added).[8]

---

[8] The shareholders' resolution, drafted with a vagueness that apparently was deliberate, admittedly had the purpose of evading the laws of the Republic of Vietnam, which then prohibited corporate dissolutions (C.A. App. 149; Than Dep. 16). It should, accordingly, be viewed with the greatest circumspection in the present setting, because it could easily be read to the contrary should creditors or depositors of the Bank appear to lodge claims against the shareholders individually or if it otherwise seemed in their interest to do so. See *Schmieder* v. *Hall*, 545 F.2d 768 (2d Cir.), aff'g 421

The application did refer to an opinion letter to petitioner from his counsel that discussed the resolution, although even counsel did not claim that the resolution itself effected a dissolution or transfer. Rather, he stated that (C.A. App. 401):

> [T]he resolution * * * constitutes authorization for those directors in the United States to either operate the business of the Bank here in the United States or to dissolve the Bank's activities in the United States and distribute its assets here in the United States to creditors and shareholders.

In any event, petitioner made no allegation that there was notice of any purported transfer of assets given either to the Army or to any of the other holders of American-based assets prior to blocking, which is required to establish the validity of such a transfer. 31 C.F.R. 500.203(b). Accordingly, there is no basis for review by this Court of petitioner's contentions as to the effect of the shareholders' resolution.

3. Petitioner argued below in the alternative that he is entitled to receive the funds on behalf of the stockholders because the Bank ceased to exist as a corporate entity upon the fall of Saigon. The court of appeals correctly rejected this assertion because

---

F. Supp. 1208, 1212 n.5 (S.D.N.Y. 1976); *Standard Oil Co.* v. *Clark*, 163 F.2d 917, 920, 923 (2d Cir. 1947), cert. denied, 333 U.S. 873 (1948); *Beck* v. *McGrath*, 182 F.2d 315, 316 (2d Cir. 1950). "Trust" arrangements designed to evade the purposes of the Trading With The Enemy Act have been rejected by the courts. *Herrmann* v. *Rogers*, 256 F.2d 871 (9th Cir. 1958), remanded, 358 U.S. 332 (1959), prior opinion reaffirmed 274 F.2d 842 (9th Cir.), cert. denied, 364 U.S. 821 (1960); *Koehler* v. *Clark*, 170 F.2d 779 (9th Cir. 1948). See *Stoehr* v. *Wallace*, 255 U.S. 239 (1921).

it was not first presented to the Secretary (Pet. App. A23-A24), concluding that the district court therefore had erred in addressing this contention on the merits (*id.* at C20-C22). It is difficult to ascertain whether petitioner renews that contention here (see Pet. 12, 16, 30, 31), despite this procedural defect. In any event, petitioner's argument is groundless.

First, even assuming that the Bank ceased to exist and that its assets were expropriated prior to the effective application of the blocking regulations, petitioner's claim to the assets is not advanced thereby. The Regulations block not only assets belonging to designated nationals, such as the Bank, but also "property in which *any designated foreign country* * * * had any interest of any nature whatsoever, direct or indirect" (31 C.F.R. 500.201(a) (emphasis added)). As the district court noted, "[a] government with the power to expropriate also has the power to assert a claim as the successor to an expropriated bank's foreign-based assets" (Pet. App. C21).[9]

---

[9] Petitioner erroneously contends (Pet. 35-36) that this conclusion conflicts with the Fifth Circuit's decision in *Real* v. *Simon*, 510 F.2d 557 (1975). On the facts of that case, the court of appeals invalidated the continued blocking of funds in a Miami account of a deceased Cuban national because all of the heirs resided in the United States. The Fifth Circuit was careful to point out, however, that "[t]here is no contention by the United States that the Cuban government has any right or claim to this property, nor is there any assertion that any person in Cuba has any interest in the property." 510 F.2d at 561. Here, in contrast, there is a distinct likelihood that the Government of Vietnam would assert an interest in the property, and several of the shareholders of the Bank apparently still are in Vietnam. See note 4, *supra*. The court in *Real* v. *Simon* also distinguished *Nielsen* v. *Secretary of Treasury*, *supra*, on the ground that that case, like the instant case, involved assets

Moreover, on the administrative record before the Secretary, there was no evidence to support the claim that at the time of the freezing of Vietnamese assets, the Bank had been expropriated without any provision for compensation. Petitioner presented only the unsupported assertions of counsel in his opinion letter (C.A. App. 401-402). Nor was there evidence to support the claim that the Bank never opened again after April 1975. Indeed, petitioner's counsel stated that "[o]n or before *September 1, 1975*, the Communist Government of Vietnam nationalized all privately-held banks in Vietnam," and that "[*s*]*ince then*, the Dong Phuong Bank has not operated in Vietnam as a private bank at all" (C.A. App. 401) (emphasis added). The September 1, 1975 date, of course, was some four months after the date on which petitioners asserted below that the Bank's assets had been expropriated.

In addition, although the courts below properly considered only the administrative record, the submissions of petitioner to the district court strongly suggest that the Bank in fact did do business in a private capacity after April 30, 1975, the effective date of the blocking order, and that the present government of South Vietnam would almost surely assert an interest in the blocked assets of the Dong Phuong Bank. See note 5, *supra*. If the Bank *did* do business after April 30, 1975, its assets are obviously blocked as those of a "designated national," although they also are blocked by the mere fact that the Bank is a "corporation * * * organized under the laws of"

---

belonging to an entity incorporated in and therefore having the nationality of the country against which the blocking order was directed. 510 F.2d at 561.

Vietnam. 31 C.F.R. 500.302(a)(2). Even if that subsequent activity was under the auspices of the revolutionary National Bank, the assets nevertheless would be blocked as those of a "designated foreign country." 31 C.F.R. 500.201.

Petitioner has admitted that major corporations, such as the Bank, were not permitted to dissolve at the time in question here (C.A. App. 149; Than Dep. 16). But despite that prohibition, he claims that the private resolution of the Bank's shareholders was effective to wind up the affairs of the largest private commercial bank in Vietnam, with total assets worth $29.5 million and loans outstanding of more than half that amount (see C.A. App. 161, 163).

Although the Regulations authorize individuals who were in partnerships or had sole proprietorships to obtain unblocking licenses under certain circumstances, even then the Secretary has required "[d]etailed information," lacking here, regarding assets, debts, and creditors. 31 C.F.R. 500.558 and 500.559. In any event, this case involves a corporate legal entity, not a partnership or sole proprietorship. It is entirely reasonable for the Secretary to treat corporations as having a legal existence separate and apart from its shareholders. *Nielsen* v. *Secretary of Treasury*, *supra*, 424 F.2d at 843; *Agajan* v. *Clark*, 381 F.2d 937, 939 (D.C. Cir. 1967). Accord *Restatement* (*Second*) *Foreign Relations Law of the United States* § 27 (1965). Petitioner and the other shareholders deliberately chose to form a separate corporate entity. As is the law in most nations, they thereby were protected from individual liability for the debts of the corporation (see Than Dep., Exh. 2, Art. 28, at 3). They cannot now so readily ignore the corporate entity they created, treat its assets and those of the

Bank's depositors as their own, and ignore its possible liabilities.[10]

The decision in *Nielsen* v. *Secretary of Treasury*, *supra*, is in accord with the decision below in this respect. There the court of appeals rejected virtually identical claims involving frozen assets of a Cuban corporation, three-fourths of the stock of which was owned by persons who had emigrated to the United States or other western countries prior to the effective date of the blocking order. 424 F.2d at 835-836. After the stockholders emigrated and after the effec-

---

[10] In the district court, petitioner claimed there was a "run" on the Bank and that most depositors were able to withdraw their deposits (C.A. App. 163, 169; Than Dep. 17-18, 27). However, he was curiously silent about the Bank's creditors—how many there were, where they might be located, or the amount of the Bank's debt. Petitioner was not without some information about these matters, since immediately before adoption of the resolution, he gave the directors and shareholders a report on the assets *and liabilities* of the Bank for the first quarter of 1975 (C.A. App. 404). No such report was provided the Secretary or the district court.

It is not unreasonable to assume that the Bank had substantial creditors in Vietnam and perhaps elsewhere. The most obvious such creditor is the National Bank, to which the Dong Phuong Bank pledged its assets, such as treasury bills and loans, in order to meet the liquidity problem presented by the "run" of depositor withdrawals (C.A. App. 169; Than Dep. 27-28, 33). In the event that the Dong Phuong Bank's borrowers failed to make their payments, the National Bank no doubt would have recourse against the Dong Phuong Bank.

Finally, even as to the particular payment due under the Army contract in this case, petitioner failed to establish what amount, if any, was due to the Bank. The contractor's assignment of proceeds to the Bank was for purposes of collection and authorized the Bank to receive for its own account only that amount due it; the remainder was to be deposited to the account of the contractor itself (C.A. App. 413).

tive date of the blocking order, the Cuban government seized the corporation's property and terminated its operations. *Ibid.* Nevertheless, the court of appeals sustained the Secretary's denial of license applications of the individual shareholders for the release of frozen assets belonging to the corporation.[11]

4. Petitioner suggests (Pet. 30-32) that by refusing to issue an unblocking license, the Secretary has given extraterritorial effect in the United States to an allegedly confiscatory expropriation of the assets of the Dong Phuong Bank by the present Government in South Vietnam (*ibid.*). The courts below correctly rejected this contention (Pet. App. A28, C25-C26).

The Secretary plainly has not given extraterritorial effect to a purported expropriation of the Bank's assets in the United States by the Government of Vietnam. The Government of Vietnam is not a party to this suit, and it has not asserted any claim to the assets involved here. Nor does the Secretary's refusal to unblock the assets at this time serve to vest title to them in Vietnam. These assets are simply subject to a temporary blocking that preserves the status quo until American claims are resolved or some other political agreement is reached. This Court has recognized

---

[11] Petitioner's reliance (Pet. 25-26) on *Kaufman* v. *Societe Internationale*, 343 U.S. 156 (1952), for the proposition that the corporate veil here should be pierced is wholly misplaced. That case involved the vesting of assets in which nonenemy aliens and American citizens had an interest. As pointed out by both courts below (Pet. App. A25 n.15, C28-C29), there has been no such vesting of the Dong Phuong Bank's American-based assets that might permanently deprive the shareholders of their ability to recover compensation for their interest in the firm. Thus, the principle of *Kaufman* has no bearing here.

the legitimacy of such actions in *Dames & Moore* v. *Regan*, *supra*.

Moreover, petitioner failed to establish the extent of his interest in the assets involved here. There was, for example, no proof that there would be any net assets left after payment of the Bank's depositors and other creditors. Indeed, there is not even any reliable proof, much less a determination, that there was an uncompensated expropriation. The most recent radio broadcast referred to by petitioner, to the extent that it and the others are reliable, indicated that the Vietnamese banks, including the Dong Phuong, were to pay their depositors and collect debts, and that there was to be some accounting with the banks' shareholders (C.A. App. 200).[12]

5. Petitioner's claim that his property has been taken without just compensation need not delay this Court. The assets are temporarily blocked; they have not been taken from the Bank and disposed of. Under the same or similar regulations, Chinese assets were blocked for 30 years before being released under a settlement between the respective Governments, and Cuban assets have now been blocked for some 20 years. Petitioner's contention that a taking is effected by the blocking or freezing of assets under such circumstances—in order to permit a diplomatic solution to the complex questions of competing claims, but

---

[12] Because the Secretary's decision declining to grant an unblocking license at this time merely preserves the status quo and does not give extraterritorial effect to an expropriation decree of a foreign sovereign, petitioner's assertion (Pet. 31, 39-40, 47) that the decision below conflicts with the Fifth Circuit's decision in *Maltina Corp.* v. *Cawy Bottling Corp.*, 462 F.2d 1021, cert. denied, 409 U.S. 1060 (1972), regarding such extraterritorial effect is without merit.

without a vesting of title to the property in the United States or any other person—would impose a substantial obstacle to the ability of the United States to engage in the very claims settlement process that this Court only recently sustained in *Dames & Moore* v. *Regan*. For this reason, the federal courts that have considered a taking claim in this setting have rejected it. *Cheng Yih-Chun* v. *Federal Reserve Board of New York*, 442 F.2d 460, 465 (2d Cir. 1971); *Nielsen* v. *Secretary of Treasury*, *supra*, 424 F.2d at 843-844. Even assuming that a temporary freeze might at some point attain a sufficient duration to ripen into a taking, the length of the freeze of Vietnamese assets in this case surely cannot be thought to have attained that duration, in light of the far longer freezing of Cuban and Chinese assets, cited above.[13]

We do not dispute, of course, that "friendly aliens [have] the right to just compensation for the requisitioning of their property by the United States." *Silesian-American Corp.* v. *Clark*, 332 U.S. 469, 479-480 (1947); *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481, 489 (1931). The freezing of the Bank's assets pending an accounting and settlement has not, however, worked such a requisitioning. Cf. *United States* v. *Caltex, Inc.*, 344 U.S. 149 (1952).

---

[13] The Court considered it premature to decide whether the suspension of claims involved in *Dames & Moore* constituted a taking, and merely left the petitioner there free to assert such a claim under the Tucker Act. *Dames & Moore* v. *Regan*, *supra*, 453 U.S. at 688-689. Petitioner Than already has filed such an action in the Court of Claims (now the United States Claims Court), which has been stayed pending final action in this case. *Tran Qui Than* v. *United States*, Civ. No. 287-81C (filed Apr. 29, 1981).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General
J. PAUL MCGRATH
Assistant Attorney General
LEONARD SCHAITMAN
AL J. DANIEL, JR.
Attorneys

NOVEMBER 1982

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 382209 1164